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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1947

No. 386

JESSE M. CARNEY and MILTON GRADY RAMSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the Supreme Court of the United States, Fred M. Vinson, and to the Honorable Associate Justices Thereof:

Your petitioners, Jesse M. Carney and Milton Grady Ramsey, petition this court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of conviction as to Count Two of the Indictment, and as grounds thereof set forth as follows:

Opinion Below.

The Opinion of the court below is not yet published. It is on page 129 of the Record.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, U. S. Codes and by Title 18, Section 72, U. S. Codes. The appellants were indicted [R. 2] by the United States Grand Jury for the Southern District of California, Central Division. Judgment against them was pronounced on March 2, 1945. Notice of Appeal was duly and regularly filed and the cause was decided on August 22, 1947, reversing Count One of the indictment and affirming Count Two of the indictment [R. 29].

Petition for rehearing as to Count Two of the indictment was filed and considered, and denied September 10, 1947 [R. 146].

Statutes Involved.

Title 18, Section 72, U. S. Codes:

> "§72. *(Criminal Code, section 28.) Making, forging, counterfeiting, or altering bonds, bids, or public records; transmitting such papers.* Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall

transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000, or imprisoned not more than ten years or both. (R. S. §§5418, 5479; Mar. 4, 1909, c. 321, §28, 35 Stat. 1094.)"

Fourth and Fifth Amendments to the Constitution of the United States.

Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Questions Presented by This Appeal.

1. Whether papers and effects in a garage are covered by the provisions of the Fourth Amendment to the Constitution of the United States requiring a search warrant?

2. Whether an affidavit setting out merely that the defendants acquired property, which in and of itself was innocent in its character, was sufficient to establish reasonable and probable cause that the crime of counterfeiting was taking place and raising the question as to the sufficiency of an affidavit to show reasonable and probable cause where the affidavit is insufficient of itself to show that a crime was being committed?

3. Whether an exploratory search may be made and evidence seized and not specifically described in any affidavit or search warrant?

4. Whether the introduction in evidence of exhibits thus seized violates the defendant's rights under the Fourth and Fifth Amendment to the Constitution of the United States?

5. Whether an indictment which has been altered by the Clerk of the Court on orders of the court as to Count One of the indictment nullifies the entire indictment since the indictment was based on the same evidence furnished as to counts one and two or whether such indictment is severable as to counts one and two for the purpose of nullifying only half the indictment?

6. Whether evidence introduced as to alleged counterfeit gas ration stamps relating to a count which was quashed because the indictment was altered so far prejudices the defendant as to count two as to require a reversal of the judgment as to count one?

7. Whether mere possession of partially printed gasoline ration coupons with nothing more establishes an intent to utter and publish them as true and to defraud the United States?

8. Whether the court erred in refusing instructions of the defendants as to their theory of the case?

9. Whether a printing is a "writing" within the meaning of Title 18, Section 72 U. S. C. A.?

10. Whether the court erred in instructions given as to a printing being a "writing" and thus extending the plain language of the Statute?

Reasons for Allowing the Writ.

I.

The questions herein involved are important in relation to the scope and effect of the Fourth Amendment to the Constitution of the United States.

The court has held that a garage is not covered by the provisions of the Fourth Amendment to the Constitution of the United States, yet the Fourth Amendment is not limited to a home or place of business, but includes all papers and effects. In this day and time, a garage is a place where one keeps many of his papers and effects.

The court's opinion is in conflict with the applicable decision on the Fourth Amendment to the Constitution of the United States and the scope which it covers, particularly *Weeks v. U. S.*, 245 U. S. 618, 62 L. Ed. 513; *U. S. v. Lefkowitz*, 285 U. S. 452, 76 L. Ed. 877; *Harris v. U. S.*, 91 L. Ed. 1020.

II.

The court erred in holding the search warrants were sufficient.

III.

This case involves, again, the important question of whether an affidavit in support of a search warrant must be sufficient to establish facts before a jury.

IV.

The case also involves the important question of whether the alteration of an indictment in Count One still permits the court to permit the indictment to stand as to the other count, where the same evidence was used to obtain the indictment on both counts.

V.

The important question is raised as to whether the court erred in holding that printings are "writings" within the meaning of the Statute making an offense to counterfeit "other writings" which are separate and apart from printings and thus extends the statutory definition of a writing.

VI.

The question is also raised by this appeal as to whether persons charged with and arrested in the act of printing are guilty of "uttering and publishing" as charged in count two of the indictment.

VII.

The question is also raised as to the scope and extent of instructions to which a defendant is entitled presenting his theory of the case, and the question is important in this court's supervisory powers in these matters.

For each and all of these errors, the defendants pray for reversal of the judgments as to Count Two of the indictment.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

IN THE

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OCTOBER TERM, 1947.

No. .....

JESSE M. CARNEY and MILTON GRADY RAMSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion below has not yet been published but is to be found on page 129 of the Record.

Jurisdiction.

Jurisdictional statement in the petition is herein adopted.

Statutes Involved.

The Statutes involve Title 18, Section 72, U. S. Codes and the Fourth and Fifth Amendments to the Constitution of the United States. These are all quoted in the Petition.

Summary of the Argument.

SPECIFICATION OF ERRORS.

A review should be granted because:

I.

The District Court and the Circuit Court of Appeals erred in holding that a garage is not protected by the provisions of the Fourth Amendment to the Constitution of the United States.

II.

The District Court and the Circuit Court erred in holding that an affidavit should not set forth probable cause to believe that a crime was being committed, or specifying the articles to be seized was sufficient basis for a search warrant of a house.

III.

The District Court and Circuit Court erred in holding that an exploratory search could be made on the basis of a search warrant which was not founded on an affidavit setting out reasonable and probable cause and specifically describing the articles to be seized.

IV.

The District Court erred in admitting the evidence so seized to be introduced in the trial of the defendants over timely objections.

V.

The Circuit Court erred in holding that where it had found an indictment to have been altered in Count One that nevertheless Count Two could stand.

VI.

The District Court erred in holding that evidence which was quashed in relation to Count One did not prejudice the defendants as to Count Two.

VII.

The District Court erred that mere possession of gasoline ration coupons, which were being counterfeited, showed an intent to utter and publish them as true.

VIII.

The District Court erred in holding and instructing the jury that printings are "writings" within the meaning of Title 18, Section 72, U. S. Codes.

Each of these questions are important in the administration of criminal law and involve fundamental constitutional rights of the defendants.

Argument.

This petition should be granted to settle fundamental questions of criminal law not heretofore decided by this court and also in the exercise of the supervisory powers over criminal cases.

The Circuit Court of Appeals has held that a garage is not covered by the Fourth Amendment to the Constitution of the United States. The Fourth Amendment is not limited to homes or offices but covers "the right of the people to be secure in their persons, houses, papers and effects." Such broad designation extends to a garage as well as to a house.

The Government, in this case, does not claim that the papers seized or the instruments seized belong to the Government as in *Davis v. United States,* 328 U. S. 590.

They allege that they did not belong to the Government. See also *Harris v. United States,* 91 L. Ed. 1020, and the dissenting opinions therein.

The Court also failed to distinguish in its decision the requirements of an affidavit showing probable cause. This affidavit must set forth facts sufficient to satisfy a jury.

Grau v. U. S., 287 U. S. 124.

The Circuit Court also permitted the seizure of articles for evidence on the basis of a search that of itself was illegal.

The Court failed to distinguish between search and seizure, both of which are forbidden by the Fourth Amendment.

Boyd v. U. S., 29 L. Ed. 752, 116 U. S. 616.

The Circuit Court erred in holding that the alteration of the indictment only nullified half of the indictment.

The Circuit Court held that Count One of the indictment was a nullity because it was altered by the trial judge, but it held that this could not affect Count Two. However, the grand jury in returning the indictment, the evidence on which Count One was based, was the basis for returning Count Two which charged "uttering and publishing with intent to defraud the United States" by the ration coupons referred to in Count One. These were designated by the Grand Jury in Count One as K-14 ration coupons. Since there were no K-14 ration coupons, it should have nullified the entire indictment, not merely half of it.

Ex Parte Bain, 121 U. S. 1;
Edgerton v. U. S., 143 F. (2d) 697;
Albrecht v. U. S., 273 U. S. 1, 8.

The third question raised by this appeal is whether the evidence is sufficient to sustain a conviction on Count Two which charges possession with the intent to utter or publish as true gasoline ration coupons, where there is no evidence of the intent to utter or publish them and the accused are arrested during the course of a printing.

However, it has been said by the Supreme Court in such a case that the case of *Mitchner v. United States,* decided by the Supreme Court in the *per curiam* opinion on June 2, 1947, on authority of *Blockberger, Albrecht* and *Gaviaras* cases, 284 U. S. 299 (*Blockberger v. U. S.,* 284 U. S. 299; *Albrecht v. U. S.,* 273 U. S. 1, 11; *Gaviaras v. U. S.,* 220 U. S. 338). We think that those cases support our contention. The mere act of making gas ration coupons does not prove, the next step, an intent to utter and publish. Nor the further essential of the statute of an intent to defraud the United States. (Title 18, Sec. 72.) Therefore, where the Government has only established the act of making, it cannot punish for the uttering and publishing with intent to defraud the United States until that step has been reached. There is no evidence in this case that that step has been reached.

If the two offenses had been held to be identical this would alter the situation but since the offenses are held to be different the Government must prove each step in the case beyond a reasonable doubt and no such proof was offered or established here.

The question is also raised in this case as to whether other writings contained in Title 18, Section 72 are writings as that word is defined in its ordinary common and accepted meaning also includes printing. Congress has not had any difficulty in setting out printings in its coun-

terfeit statutes through Title 18, U. S. Codes, where it wanted to include printing. An examination of Title 18 shows among other statutes that the following specifically use the word "printing" in counterfeiting statutes.

It is not within the power of the court to extend the plain meaning of the words used by Congress in the particular statute.

Vicreck v. United States, 317 U. S. 618, 87 L. Ed. 501.

Writing are not printings.

The court's supervisory power is also called upon to determine the scope of instructions which should be given where a defendant has advanced the theory in his evidence that the printings were to be used for the printing of menus on a Victory Day and offers instructions along the line of this defense.

A defendant is entitled to have instructions tendered to the jury on his theory of the case.

People v. Putnam, 20 Cal. (2d) 885;
People v. Warren, 16 Cal. (2d) 103;
Screws v. U. S., 325 U. S. 91.

Wherefore, petitioners pray that this Honorable Court grant a Writ of Certiorari directed to the Circuit Court of Appeals for the Ninth Circuit that the judgment may be reviewed and reversed and the indictment nullified.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

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In the Supreme Court of the United States

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PETITIONERS
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 129–144) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 22, 1947 (R. 145), and a petition for rehearing was denied September 17, 1947 (R. 146). The petition for a writ of certiorari was filed October 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act

of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a search warrant under which counterfeiting materials and counterfeit ration coupons were discovered and seized was invalid for alleged lack of a showing of probable cause in the supporting affidavits or for alleged failure to specify the items to be seized, and whether the officers were authorized to seize contraband not specified in the warrant.

2. Whether the circuit court of appeals erred in affirming petitioners' convictions on count 2 after reversing the convictions on count 1 because of an amendment of that count made in the trial court.

3. Whether the evidence is sufficient to support petitioners' convictions of possessing counterfeit ration coupons with intent to utter and publish them as true.

4. Whether the trial court erred in refusing petitioners' proffered instructions setting forth the theory of their defense and the evidence to support it.

5. Whether printed ration coupons are "writings" within the meaning of the forgery and counterfeiting statute.

STATUTE INVOLVED

Section 28 of the Criminal Code (18 U. S. C. 72) provides in pertinent part:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; * * * shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

STATEMENT

On January 10, 1945, an indictment in two counts was returned against petitioners in the District Court for the Southern District of California (R. 2–3). The first count charged that on

or about December 1, 1944, they made, forged, and counterfeited, with intent to defraud the United States, "certain writings, to wit: K–14 h gasoline ration coupons" (see R. 2, 7, 129–130, 138–139). The second count alleged that on or about December 11, 1944, petitioners had in their possession, with intent to defraud the United States and to utter and publish as true, "certain false and counterfeit writings, to wit: 2250 Series A–14 h ration coupons," knowing them to be false and counterfeit (R. 2–3).

After the jury was empaneled but before any evidence was adduced, count 1 was amended, with the consent of counsel, by substituting the letter A for K in the description of the coupons (R. 7), apparently on the ground that the K was an inadvertent or typographical error (see R. 143).

Petitioners were convicted on both counts (R. 11), and they were each sentenced to imprisonment for five years on count 1 and three years on count 2. Execution of the sentences on the first count was suspended, and they were placed on probation for five years to commence upon their release from imprisonment under the sentences on count 2 (R. 12–15).

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the convictions on count 2 were affirmed, but the convictions on the first count were reversed (R. 145) on the ground that the amendment of that count without reassembling

the grand jury ousted the trial court of jurisdiction to proceed on it (R. 138–143).

The evidence and proceedings relating to the issues raised by the petition for a writ of certiorari may be summarized as follows:

Prior to petitioners' arrest and indictment the fact that counterfeit gasoline ration coupons were circulating in Los Angeles was brought to the attention of local O. P. A. officials by a service station operator who had received such coupons in exchange for gasoline. Similar counterfeit coupons also appeared at the San Francisco Verification Center of the Office of Price Administration. (R. 81–82.) An investigation was made (see R. 84–85), as a result of which application was made to a United States Commissioner for a warrant to search premises occupied by petitioners. The affidavits of an agent of the Currency Protection Branch of the Office of Price Administration and a Secret Service agent in support of this application recited in detail that the agents had personally seen petitioners enter certain business establishments in Los Angeles where they purchased type similar to type used in printing gasoline ration coupons and that investigation at other establishments which they had seen petitioners enter disclosed that petitioners had purchased inks and tints in colors similar to those used in processing paper for printing coupons, as well as a sheet of brass plating, a perforating

rule and a hand press suitable for use in printing coupons. Petitioners used fictitious names in making these purchases. The agents also saw petitioners take the materials they had purchased to a residence at 2433 Exposition Place. (R. 26–30.) On the basis of these affidavits the Commissioner issued a warrant (R. 23–24) addressed to named agents of the Secret Service commanding them

> to enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the day or night time, then and there to search the said premises, including outbuilding, cellars, passageways, and rooms connected therewith, for the property, articles and things above described, which may be found to be located in and upon the premises above described or in any part thereof, and to seize and bring the same before me * * *.

The warrant described the property sought under it as

> one hand press, brass sheeting, gothic, bold faced and light line type, printing inks, one six-inch roller, perforating rules and type clamp.

The agents named in the warrant, accompanied by two special agents of the O. P. A., proceeded to the premises designated in the warrant, where they observed the arrival of petitioner Carney in an automobile. Carney removed a large package

from the automobile and carried it to a garage at the rear of the premises and there petitioner Ramsey opened the garage door and admitted him. (R. 60.) Two of the agents then went to the garage and, finding the door slightly ajar, entered (R. 61, 68). As they did so they observed both petitioners standing at a hand printing press; Ramsey "had just turned loose of the handle," which was still spinning (R. 61, 70). The agents identified themselves and tendered the search warrant, but petitioners refused to accept it (R. 61, 67, 70). Thereupon petitioners were arrested (R. 61, 67–68, 70) and the warrant was placed on a work bench next to the printing press (R. 61–62). Later, on the advice of one of the agents, Ramsey picked up the warrant (R. 62).

On the bed of the printing press was a freshly inked plate with a background "as used on gasoline ration coupons" on which were about 60 sets of the letters "U. S. A." (R. 62, 66, 77; Gov. Ex. 2, R. 67). Near the printing press the agents found "quite a few articles as used in printing, gasoline ration coupons, printing inks, different kind of inks, papers, different kind of types, also perforated rule, what we call it for perforation marks, uncut papers, and also large bundles of already cut papers as found on the bed of this press" (R. 62; see also R. 66 and Gov. Ex. 2, R. 67). When questioned by the agents concerning these articles, petitioners re-

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plied that they "had nothing to say" (R. 69). Thereafter, two of the agents remained in the garage with Carney while the other two went into the house with Ramsey (R. 62). Neither of the petitioners at any time attempted to exclude the agents from the premises (R. 69). In the various rooms of the house the agents found a large number of partially printed and finished sheets of counterfeit gasoline ration coupons scattered upon the floor, tables, etc., for drying (R. 63, 72–74, 79–80; Gov. Exs. 1, R. 63–64, 5, R. 74). The agents also searched both petitioners and found a number of counterfeit ration coupons which were similar in every way, including serial numbers, with those found in the house (R. 70–72, 78). The counterfeit coupons found on the premises were likewise similar to those which had previously been turned in to O. P. A. by the gasoline station operator (R. 85; see p. 5, *supra*).

The agents seized all of the above described counterfeiting equipment and the counterfeit ration coupons, and, as required by the terms of the warrant, made a return listing all the items thus seized (see R. 25–26).

Prior to trial petitioners moved in the district court to quash the search warrant and for an order to return the seized items to them on the grounds, *inter alia,* that the affidavits upon which the warrant was issued did not sufficiently show

probable cause and that the warrant insufficiently identified the property to be taken thereunder (R. 31–43). The motion was denied (R. 5; see also R. 58–59).

ARGUMENT

1. Petitioners' principal contention here renews their objections to the search warrant and to the seizure first asserted in the trial court (Pet. 4, 6, 10, 11–12). However, as we have already indicated, the affidavits in support of the application for the issuance of the warrant described in detail the observations of the government agents that petitioners had purchased many different items similar to those used in making ration coupons, that the purchases had been made under fictitious or assumed names and that the materials thus acquired were taken by petitioners to the premises for which the search warrant was sought. While it may be that the evidence thus placed before the commissioner might not, standing by itself, be sufficient to support a conviction of the offenses for which petitioners were indicted, nevertheless, it was plainly admissible evidence and was obviously such as to warrant a man of prudence and caution in believing that the felonies of counterfeiting and illegal possession of counterfeit writings were being or had been committed at the premises in question. Accordingly, there was,

within the statutory requirements,[1] sufficient showing of probable cause for the issuance of the search warrant. See, e. g., *Carroll* v. *United States*, 267 U. S. 132, 161; *Dumbra* v. *United States*, 268 U. S. 435, 441; *United States* v. *McGuire*, 300 Fed. 98, 102 (N. D. N. Y.), affirmed, 6 F. 2d 576 (C. C. A. 2). Not only were there sufficient facts and circumstances showing probable cause for the issuance of the warrant, but the warrant did not, as petitioner asserts (see Pet. 10), give the officers blanket authority for an exploratory search; on the contrary it specifically itemized the materials and instruments to be

[1] The Act of June 15, 1917, c. 30, Title XI, 40 Stat. 228, provides in pertinent part:

"Sec. 3 [18 U. S. C. 613] A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

* * * * * * *

"Sec. 5 [18 U. S. C. 615] The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6 [18 U. S. C. 616] If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

seized. While it is true that the materials and equipment actually seized by the officers included items, especially the counterfeit coupons, in addition to those specified in the warrant, the seizure of such items was proper under the circumstances. The additional items seized were similarly instrumentalities of the offenses on the basis of which the warrant was issued and were, it would now seem, subject to seizure upon discovery in the course of the lawful search. *Harris* v. *United States,* 331 U. S. 145, 154–155; cf. *Marron* v. *United States,* 275 U. S. 192, 195–198. In addition, because of the variety of materials that might be utilized in counterfeiting operations, greater particularity would have been difficult, if not impossible. Cf. *Nuckols* v. *United States,* 99 F. 2d 353, 355 (App. D. C.), certiorari denied, 305 U. S. 626. Moreover, when the officers entered the premises they had full and convincing visual evidence that their arrival had temporarily interrupted petitioners' counterfeiting operations, for not only were the premises littered with counterfeiting apparatus, but the ink was still wet on the press. In these circumstances, their arrest of petitioners was lawful. Having made lawful arrests for crimes being committed in their presence on premises they had lawfully entered under the warrant, the officers were authorized to seize all the instrumentalities of the crime in open sight on the premises and to

search the persons of petitioners. See, e. g., *Harris* v. *United States, supra; Marron* v. *United States,* 275 U. S. 192; *Agnello* v. *United States,* 269 U. S. 20; *Cheng Wai* v. *United States,* 125 F. 2d 915 (C. C. A. 2).

Since, as we have shown, the search and seizure were executed under a valid search warrant which directed a search of "out-buildings" as well as the residence building, there is no occasion to consider the question discussed by the court below (R. 132–133) and renewed in the petition (Pet. 11) as to whether a garage is covered by the protection of the Fourth Amendment.[2]

2. Petitioners contend that the reversal below of their convictions on count 1 nullified the convictions on count 2 because "the evidence on which Count One was based, was the basis for returning Count Two which charged 'uttering and publishing with intent to defraud the United States' by the ration coupons referred to in Count One" (Pet. 12). However, each count of the indictment must be regarded as if it were a seperate indictment and therefore the invalidation of count 1 did not affect the validity of count 2. Petitioners were in no wise prejudiced by the evidence adduced as to count 1, for they

[2] It should be noted that only petitioner Ramsey claimed the right to the possession of the premises searched, and that petitioner Carney was neither the owner nor the occupant of those premises (R. 31, 94). Accordingly, Carney has no standing to complain of the search and seizure.

consented to the amendment of the latter count before trial. Additionally, by reason of the relation of the offenses described in both counts of the indictment, most, if not all, of the evidence adduced at the trial would have been admissible even if count 1 had never been included in the indictment.

3. Petitioners also contend that the mere proof of their possession of counterfeit gasoline ration coupons with nothing more did not establish the requisite statutory intent to utter and publish them as true and to defraud the United States (Pet. 5, 13). It should be noted in this connection that petitioners did not make this point in the trial court either by motion for a directed verdict or otherwise. In any event, there was abundant evidence from which the jury could, as it did, conclude that petitioners intended to utter and publish the ration coupons as true. For example, the Government showed that other counterfeit ration coupons had already been uttered and distributed which were of the same series and characteristics as those found on petitioners' persons and at the premises where they conducted their counterfeiting operations. Moreover, from the total evidence as to petitioners' surreptitious counterfeiting operations, the jury could fairly infer that petitioners' motive in counterfeiting on such a scale was to distribute to their profit the counterfeit coupons.

4. Petitioners further contend that the trial court erred in refusing their proffered instructions incorporating their theory of the case (Pet. 5, 14). These instructions, predicated on the testimony of petitioner Carney that the symbols petitioners printed were intended for use on a victory day restaurant menu (R. 90–97), purported to pose for the jury the question whether petitioners had the requisite unlawful intent by reviewing for the jury the defense's view of the evidence (R. 118–119). It is clear, however, that there was no error in refusing such instructions, for a federal trial judge in presenting the theory of the defense, is not obliged to comment on the evidence in a criminal case. See, e. g., *United States* v. *Cohen,* 145 F. 2d 82, 92 (C. C. A. 2). Petitioners are therefore in no position to urge that they were prejudiced because the judge, in presenting the issues to the jury and in the legitimate exercise of his discretion, did not comment on any evidence in the case. The proposed instructions went solely to the issue of intent and that issue was submitted to the jury under full and correct instructions, not here attacked, which described for the jury the intent they were required to find before they could convict (see R. 101–102). Moreover, the trial judge carefully instructed the jury that a defendant is a competent witness on his own behalf and that his testimony is entitled to full and fair consideration

(R. 102), thus giving the jury full opportunity to evaluate, along with the other evidence, petitioners' defense.

5. Finally, petitioners contend that since ration coupons are printed, they are not "other writings" within the meaning of the counterfeiting statute (*supra*, p. 3), and that, therefore, the trial court's instruction to the jury that such coupons were "writings" (R. 101) was error (Pet. 5, 13–14). However, it is clear, as we showed in detail in our brief in opposition in *Andrews* v. *United States*, No. 881, O. T. 1946, pp. 6–9, certiorari denied, 330 U. S. 821, that the statutory description of certain specified documents and "other writings" comprehends all of the documents enumerated in the statute, as well as all other documents, written or printed, so as to protect the general government against the consequences that might result from forgery, alteration, or counterfeiting of papers or documents in connection with its functions. See *Cross* v. *North Carolina*, 132 U. S. 131, 138. Moreover, all the reported decisions that have considered the question have concluded that a ration coupon is a "writing" within the meaning of Section 28 of the Criminal Code. *United States* v. *Serpico*, 148 F. 2d 95 (C. C. A. 2); *United States* v. *Raskin*, 52 F. Supp. 343, 345 (E. D. N. Y.); *United States* v. *Mullin*, 51 F. Supp. 785, 787 (E. D. Mo.).

CONCLUSION

The judgment of the circuit court of appeals affirming petitioners' convictions on count 2 of the indictment is clearly correct and the petition for a writ of certiorari presents no question of importance. Accordingly, we respectfully submit that the petition should be denied.

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NOVEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947